IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT No. 1557 of 1982.

1- The Kerala State Cashew
Development Corporation Ltd.

2- Kerala State Government
Insurance Department. ... Plaintiffs.

V/s.

1- Black Sea Shipping Company.

2- Messrs.Trans Ocean Shipping
Agencies Private Ltd. ... Defendants.

U.Makhija with Ms.N.Motiwala i/b. Motiwala
& Co. for the plaintiffs.

None for the defendants.

CORAM : V.C.DAGA, J.

DATED : 20th January 2006.

JUDGMENT :

The plaintiff No.1 is a company incorporated under the Companies Act, wholly owned by the State of Kerala. Plaintiff No.2 is an insurance company owned by the Government of Kerala carrying on business in the State of Kerala. The plaintiff No.1, in or about April, 1981, had purchased from M/s.Metall Und Rohstoff A.G. Switzerland ("Shippers" for short), 133 bundles of "Tin Plate Prime" ("suit consignment" for short) under their invoice No.5451 dated 25th April, 1981 for total value of U.S.$ 1,50,905.45.

2. On or about 30th April, 1981, the Shippers delivered and entrusted to defendant No.1, at the port of Bilboa in Spain, the aforesaid consignment of 133 bundles of Tin Plate Prime of net weight 184.481 m.t. Of the value of U.S.$ 1,50,905.45 in good condition for being carried to the port of Bombay on payment of freight charges, which were received from defendant No.1 in Spain.

3. The defendant No.1 issued a clean bill of lading bearing No.14; dated 20th April, 1981, whereby defendant No.1 admitted and acknowledged to have received the suit consignment with freight charges.

4. The aforesaid bill of lading mentioned the consignee as “to the Order of State Bank of Travancore A/c”. The Kerala State Cashew Development Corporation Limited, Quilon/ South India was a notified party. The plaintiff No.1 being the endorsee/ assignee of the said bill of lading and/or as the holder for value of the said bill of lading and/or owner of the suit consignment claimed to be entitled to delivery thereof. The plaintiff No.1 had insured the suit consignment with plaintiff No.2 against all risks of transit, customs duty and profits under two policies; one bearing No.KSI/MC/1/00083/81 dated 7th May, 1981 and another bearing No.KSID/MC/1/00090/81; dated 9th May, 1981.

5. The plaintiffs have stated that the said vessel arrived at the port of Bombay and was berthed at 5, Indira dock; on 20th June, 1981. The said vessel was expected to discharge cargoes meant to be off-loaded at the Port of Bombay. Plaintiffs have stated that the said vessel commenced discharging its cargoes on or about 20th June, 1981 and completed the said discharge on or about 28th June, 1981.

6. The plaintiffs have stated that the said vessel, however, did not discharge any part of the suit consignment. In other words, the vessel in question failed and neglected to discharge the subject cargoe at the Port of Bombay. The

Board of Trustees of the Port of Bombay issued clearing agent's short landing certificate dated 24th November, 1981 to plaintiff No.1; wherein the Bombay Port Trust certified that the entire consignment of 133 bundles of tin plate prime were short landed by the said vessel.

7. The plaintiffs have, thus, stated in the plaint that the entire consignment was short landed. Consequently, plaintiff No.1 lodged its claim with defendant No.2 being the agents of the vessel of defendant No.1 along with their letter dated 25th July, 1981. By the said claim, the plaintiffs demanded from defendant No.2 a sum of Rs.18,98,916/-. There was no response from defendant No.2. The plaintiffs, thus, sent telex message to defendant No.2 on 12th August, 1981 requesting it to settle the claim promptly.

8. The plaintiff No.1 made similar request to defendant No.1 vide its letter dated 12th August, 1981. However, despite repeated demands made by plaintiff No.1, neither defendant No.1` nor defendant No.2 paid the amount of claim or any part thereof to plaintiff No.1. Consequently, plaintiff No.1 vide its Advocate's letter dated 31st May, 1982 called upon the defendants to pay the amount of claim with interest thereon @ 18% per annum from 25th June, 1981 till realisation of the amount in full and final.

9. According to plaintiff No.1, the defendants committed breach of contract of carriage as such they are liable to compensate and pay to the plaintiffs sum of Rs.22,40,718.00 with interest thereon @ 18% per annum on Rs.18,98,916/- from the date of the suit till the date of realisation. The plaintiffs, alternatively, claims that the defendants as bailees for reward of the consignment were bound and liable to take due care and caution in carrying and discharging suit consignment as such as a man of ordinary prudence the defendants are jointly and severally, liable to pay the plaintiffs the amount of claim set up in the suit.

10. The plaintiffs further stated that as an owner of the suit consignment plaintiff No.1 lodged a claim under the aforesaid two policies with plaintiff No.2. The plaintiff No.2 has settled the claim of plaintiff No.1 by paying to it a sum of Rs.18,98,916/-. The plaintiff No.2 by reason thereof and by reasons of a letter of subrogation executed by plaintiff No.1 in its favour has become entitled to claim all the rights and remedies of plaintiff No.1 in respect of the said consignment in accordance with law governing the contract of insurance. In the circumstances, plaintiff No.2 claims to be entitled to sue the defendants in their own name.

That is how, both the plaintiffs have filed this suit for recovery of the losses suffered by them.

11. On being summoned, defendants appeared and filed their written statement denying the claim set up by the plaintiffs.

12. This Court pursuant to the rival pleadings was pleased to frame issues on 9th December, 2005 reading as under:

(a) Whether the plaintiffs were the owners of the suit consignment as alleged in para (3) of the Plaint?

Answered in affirmative.

(b) Whether the 1st plaintiff had insured the said consignment with the 2nd plaintiffs as alleged in para (4) of the Plaint?

Answered in affirmative.

(c) Whether the defendants failed to deliver to the plaintiffs the suit consignment as alleged in para (6) of the Plaint?

Answered in affirmative.

(d) Whether the plaintiffs suffered loss of Rs.18,98,916/- being the value of the said consignment?

Answered in affirmative.

(e) Whether the defendants prove that they had discharged the said consignment at the port of Bombay as alleged in paras (7) and (8) of the Written Statement of the defendants?

Answered in negative.

(f) Whether 127 bundles out of the said consignment were duly landed and offered for delivery to the plaintiffs as alleged in para (12) of the Written Statement of the 1st defendants?

Answered in negative.

(g) Whether the defendants have performed statutory duties as bailees and have taken due and proper care of the said consignment as was required of them in law as alleged in para (13) of the written statement of the 1st defendants?

Answered in negative.

(h) Whether the liability of the defendants would be limited to US $ 100 per skid bundle as alleged in para 17 of the written statement?

Answered in negative.

(i) To what relief, if any are the plaintiffs entitled?

As per the decree.

13. When the issues were framed, neither the defendants nor their advocate was present. The plaintiffs were, therefore, directed to file affidavit of evidence along with compilation of documents. Accordingly, affidavit of evidence and compilation of documents were filed by the

plaintiffs. The original documents were also produced along with affidavit on record. The plaintiffs have produced original invoice along with original bill of lading showing quantity of goods together with its weight and value. Two original insurance policies were also placed on record. The documents evidencing claim set up by plaintiff No.1 on plaintiff No.2 and the payment thereof by plaintiff No.2 to plaintiff No.1 also stand proved on the basis of affidavit of evidence together with documents in support thereof.

14. Since nobody had appeared on the date when issues were framed and even on the subsequent dates, hearing of the suit was proceeded *ex parte*. In that view of the matter, I am constrained to hold that the plaintiffs have proved their suit claim. The plaintiff No.1 has proved that they were the owners of the suit consignment as stated in para-3 of the plaint. They have also proved that the said consignment was insured with plaintiff No.2 as stated in para-4 of the plaint. The plaintiffs have also proved that the defendants failed to deliver plaintiff No.1 the suit consignment as stated in para-6 of the plaint. Consequently, plaintiff No.1 suffered loss of Rs.18,98,916/- being the value of the said consignment. In this view of the matter, issue Nos.(a) to (d) are answered in the affirmative i.e. in favour of the plaintiffs.

15. The defendants though filed written statement, but failed to file affidavit of evidence so as to prove the issues, burden of which rest on them.

16. In the above view of the matter, I am constrained to hold that the defendants could not prove that they discharged the suit consignment and handed it over to plaintiff No.1 as stated in paras-7 and 8 of their written statement. The defendants have admitted in para-12 of their written statement that they could not offer to plaintiff No.1 127 bundles of tin plate prime.

17. The defendants also failed to prove that they discharged their duties as bailees for reward of the suit consignment and also failed to prove that they took due care and caution in carrying and discharging the suit consignment as sought to be claimed in para-13 of their written statement. The defendants, for want of evidence, failed to prove that their liability was limited to US $ 100 per skid bundle as sought to be pleaded in para-17 of the written statement. On this backdrop, issue Nos.(e) to (h) are answered in the negative i.e. against the defendants.

18. So far as plaintiff No.2 is concerned, it has proved payment of Rs.18,98,916/- by way of insurance claim to plaintiff No.1. In that view

of the matter, plaintiff No.2 shall be entitled to a decree in the sum of Rs.22,40,718/- with interest @ 10% per annum on the original amount of compensation/loss in the sum of Rs.18,98,916/- from the date of filing of suit till realisation with costs. In the result, suit deserves to be decreed in favour of plaintiff No.2. Hence order:

O R D E R

The suit stands decreed in favour of plaintiff No.2 with costs.

The defendants shall jointly and severally pay to plaintiff No.2 a sum of Rs.22,40,718/- together with interest @ 10% per annum on the sum of Rs.18,98,916/- from the date of filing of suit till realisation with costs quantified in the sum of Rs.25,000/-. The plaintiff No.1 shall bear its own costs.

Decree be drawn accordingly.

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